NO. 80204-1

SUPREME COURT
STATE OF WASHINGTON

ARTHUR T. LANE, et al., individually and on behalf of the class of all persons similarly situated, Respondents,

vs.

THE CITY OF SEATTLE, Respondent,

vs.

THE CITY OF SHORELINE, KING COUNTY, KING FIRE DISTRICT NO. 2, KING COUNTY FIRE DISTRICT NO. 4 (a.k.a. Shoreline Fire Department), NORTH HIGHLINE FIRE DISTRICT NO. 11, KING COUNTY FIRE DISTRICT NO. 16 (a.k.a. Northshore Fire Department), and KING COUNTY FIRE DISTRICT NO. 20, Respondents,

THE CITY OF BURIEN, THE CITY OF LAKE FOREST PARK, Appellants.

BRIEF OF APPELLANT CITY OF BURIEN

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I. INTRODUCTION

This case is about who should pay the cost of a public water system's infrastructure necessary to provide water for fire suppression and maintain its operating permit from the State Department of Health.[1] For over a century, Seattle Public Utilities ("SPU") has operated a water system with sufficient capacity to serve homes and businesses and to protect these structures from fire. SPU operates this system both inside and outside the City of Seattle's corporate limits. SPU's water system costs include the maintenance, operation and replacement of water mains, reservoirs and fire hydrants. The inclusion of these components in water rates was based on a sound understanding of the requirements for a water purveyor such as SPU.

Historically, water ratepayers have borne these costs, just as they would any other cost associated with the overhead of the utility. However, approximately two years ago, Seattle shifted these expenditures to its general fund. The ratepayers sought a refund of the sums they previously paid to provide sufficient water to protect their homes and businesses from fire. Seattle sought reimbursement from other local governments, Burien, Shoreline, Lake Forest Park, and King County. However, since Burien is

[1] For ease of reference, the term "fire hydrant" shall be used to refer to the cost, sought to be refunded by SPU, of providing the necessary components, infrastructure and maintenance required to supply sufficient water for fire suppression.

neither a water system purveyor, nor a provider of fire services, it should not be found liable for fire hydrant expenses as a matter of law.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error[2].

1. The trial court erred in ruling that the provision and maintenance of fire hydrants is a governmental, rather than proprietary, function of government.

2. The trial court erred in ruling that the incorporation of fire hydrant maintenance costs into the general rate structure constitutes an unlawful tax on ratepayers.

3. The trial court erred in ruling that the Cities of Burien and Lake Forest Park must reimburse the City of Seattle for the costs of maintaining fire hydrants located within the Cities of Burien and Lake Forest Park.

4. The trial court erred in ruling that the fire districts using and benefiting from the fire hydrants located within the Cities of Burien and Lake Forest Park are not obligated to reimburse the City of Seattle for the costs of maintaining these fire hydrants.

B. Issues Pertaining to Assignments of Error.

1. Whether providing fire hydrants as an integral part of a

[2] The City of Burien joins in the briefing filed by the City of Lake Forest Park; thus, the assignments of error and related issues refer to both cities.

municipal waterworks is a proprietary function of the municipality.

2. Whether the incorporation of the costs associated with operating and maintaining fire hydrants as an integral part of the water supply system into the general rate structure constitutes the imposition of a tax upon ratepayers.

3. Whether the City of Seattle has authority to recover the costs of maintaining fire hydrants located within the Cities of Burien and Lake Forest Park from the Cities of Burien and Lake Forest Park.

4. Whether the fire districts that benefit from and/or use the fire hydrants in the City of Burien and the City of Lake Forest Park are the appropriate entities to pay the costs associated with operating and maintaining fire hydrants in these cities.

III. STATEMENT OF THE CASE

A. Factual Background.

In 1890, following the "Great Seattle Fire," Seattle voters approved a proposal by Seattle's mayor and council to establish a municipal utility, now known as Seattle Public Utilities ("SPU"). CP 883, 884 at ¶ 3, 885. For more than a century, water resources developed and managed by the City of Seattle have supported the growth and prosperity of the Central Puget Sound region. CP 883, 884 at ¶ 4, 887, 889. Throughout the twentieth century, Seattle developed and expanded its water system to keep up with the rapid

growth of the region. *Id.* By mid-century, pipelines were built to carry water to Seattle's neighbors as development and population growth spread around Lake Washington and throughout King County. *Id.* According to SPU's 2001 Water System Plan Update, SPU serves approximately 1.3 million customers in the City of Seattle, King County, and a small part of southwest Snohomish County. CP 891 – 892.

To provide water service, SPU has certain infrastructure expenses. SPU's infrastructure costs include the installation and maintenance of sufficient water mains, reservoirs, fire hydrants and water. CP 679 – 680 at ¶ 8. For over a century, SPU allocated these costs to its retail customers, homeowners, and businesses through its water rates. *Id.* In 2005, after the state Supreme Court decided *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), the City of Seattle shifted theses costs to its general fund and sought reimbursement from other local governments. CP 687 at ¶ 13. Seattle demanded that local governments, whose citizens are served by SPU, pay for the cost of SPU's infrastructure outside of the Seattle corporate boundaries. CP 687 – 688 at ¶¶ 11-16.

1. City of Burien's Relationship with SPU.

On March 19, 1979, King County approved Ordinance No. 4087 to grant the City of Seattle a franchise to construct, maintain and operate water transmission lines in the area now incorporated as the City of

Burien. CP 801 – 802 at ¶ 5, 805 – 807. The City of Burien incorporated in 1993. *Id.* On April 14, 1999, Burien passed Ordinance No. 196 extending existing franchise agreements with SPU. CP 802, at ¶ 6, 814 – 815. Currently, three water districts and one municipal water utility serve Burien residents. CP 802 at ¶ 7, 816. In addition, Burien does not operate its own fire department; rather, it receives fire protection services from North Highline Fire District Nos. 1 and 2. CP 802 at ¶ 8, 817. SPU owns approximately 107 fire hydrants in Burien, located within the boundaries of both fire districts. CP 803 at ¶ 9, 818 – 819. Burien does not own any of the fire hydrants located within its corporate boundaries.[3] Further, Burien is not responsible for regulating the placement and location of fire hydrants.[4]

B. Procedural Background

On March 1, 2005, this class action case was commenced in King County Superior Court against the City of Seattle. CP 1 – 18. On July 19, 2005, the Trial Court issued an Order allowing the City of Seattle to join, as third party defendants, the municipalities whose residents were served

[3] BMC 15.20.110. "Fire hydrants and their supplying mains shall be installed to the standard of the water purveyor and shall be dedicated along with repair easements, where needed, to the purveyor."

[4] BMC 15.20.110 provides, in pertinent part, that "[O]n-site fire hydrants and mains shall be provided where required by the fire code official." BMC 15.05.080(2) provides that "[T]he fire marshal of King County Fire Protection District No. 2 shall be deemed to be the 'fire code official' for the purposes of this title."

by SPU hydrants. CP 656 – 657. The City of Seattle filed a third party complaint against the cities of Burien, Lake Forest Park, Shoreline and King County. CP 677 – 716. The third party defendants filed answers respectively. CP 725 – 730, 731 – 736, 737 – 743, 744 – 750.

On February 16, 2007, the Court heard oral argument regarding the third party defendants' Motion for Summary Judgment. On March 19, 2007, the Court entered an order denying the motion for summary judgment as to Lake Forest Park and Burien, and granting summary judgment in favor of Shoreline and King County. CP 3834 -- 3841.

IV. SUMMARY OF ARGUMENT

The provision and maintenance of fire hydrants is an integral part of SPU's waterworks. SPU is required to have hydrants in order to maintain its ability to act as water purveyor. As such, these components of SPU's water system are provided for and maintained as part of SPU's proprietary function and this cost is properly embedded in its rate structure, as are all other overhead expenses. Because the function is proprietary in nature, it is not an ulawful tax on ratepayers.

SPU has no authority to impose these hydrant costs on other cities. There is no contractual relationship through which the cities have assented to this charge and Seattle has no authority to tax another municipality, if the court concludes that this charge is in fact a tax. Thus, Seattle is

attempting to impose these charges unlawfully. Should the court conclude that the provision and maintenance of hydrants is a governmental function, then the entity that uses and benefits from those hydrants are responsible for the costs of maintaining those hydrants and that entity is not the City of Burien.

V. ARGUMENT

A. Standard of Review on Appeal.

Appellate review of a decision to grant summary judgment is de novo, and that an appellate court engages in the same inquiry as the trial court; that is: Summary judgment; is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997) (quoting CR 56(c)). A material fact is one on which the outcome of the case depends. *Atherton Condo. Ass'n. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). There are no material facts at issue in this case.

B. As a Public Water System, SPU is Required to Provide the Necessary Infrastructure to Provide Water to Fight Fires and Maintain its System; thus the provision and maintenance of hydrants is a proprietary function of SPU.

1. RCW 80.28.010 Requires Public Water Systems to Supply Fire Hydrants.

State law requires water purveyors to provide fire hydrants. Pursuant to RCW 80.28.010(2), water companies "shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable." For purposes of this section, a "water company" includes "[E]very city . . . owning, controlling, operating, or managing any water system for hire within this state." RCW 80.04.010; see also *Shannon v. City of Grand Coulee*, 7 Wn. App. 919, 921, 503 P.2d 760 (1972). Further, "[E]very . . . water company shall construct and maintain such facilities in connection with the manufacture and distribution of its products as will be efficient and safe to its employees and the public." RCW 80.28.010(8). A "water system" is broadly defined under state law to include, in pertinent part, as follows:

> [A]ll . . . fixtures, personal property, . . . or other structures or appliances operated, owned, used or to be used for or in connection with or to facilitate the supply, . . . distribution, sale, furnishing, . . . or measurement of water for . . . municipal,

domestic or other beneficial uses for hire.

RCW 80.04.010.

The broad definition of a "water system" clearly encompasses fire hydrants as "fixtures" or "other structures or appliances" that are "used or to be used" for the distribution of water. Since fire hydrants are essential for the "safe and efficient" distribution of water to the public and since SPU is a "water company" operating a "water system," state law requires SPU to "furnish" and "supply" fire hydrants. Accordingly, SPU is required to own, operate and maintain fire hydrants in a manner that is efficient and safe for its employees and the public. RCW 80.04.010, 80.28.010(2) & (8).

2. WAC 246-293-650(1) Also Mandates that Public Water Systems Provide Fire Hydrants.

In 1977, the Washington State Legislature enacted the Public Water System Coordination Act ("the Act") in an effort to maximize efficient and effective development of the state's public water supply systems. RCW 70.116.010. The Act designated the Department of Health ("DOH") to regulate water purveyors and to coordinate the planning of the public water supply systems. *Id.* Pursuant to the authority granted in the Act, DOH requires that "purveyors of systems having one thousand or more services shall submit a water system plan for review and approval by

the department." WAC 246-290-100(2)(a). A "purveyor," for purposes of the Act, includes any municipal corporation owning or operating a public water system. WAC 246-290-010. The purpose of requiring a water system plan, as well as the other regulatory requirements set forth by DOH, is to "protect the health of consumers using public drinking water supplies." WAC 246-290-001.

SPU is a purveyor of a system having one thousand or more services and is therefore required to submit a water system plan for approval at least once every six years.[5] (According to SPU's 2001 Water System Plan Update, SPU has approximately 173,408 direct service connections). WAC 246-290-100(10); CP 883, 884 at ¶ 4, 899. Since SPU is a purveyor of a Group A water system,[6] it is also required to obtain an annual operating permit from DOH. WAC 246-294-020. "No person may operate and no owner shall permit the operation of a Group A water system unless . . . the department has issued an operating permit to the system owner." WAC 246-294-030(1). The submission of a complete and satisfactory water system plan is one of the criteria DOH uses to evaluate systems and place them into operating permit categories. WAC

[5] Municipal utilities are exempted from the control of the Washington Utilities and Transportation Commission. RCW 80.04.500.

[6] A water system classified as Group A includes any water system providing service to fifteen or more service connections used by year-round residents for one hundred eighty or more days within a calendar year, regardless of the number of people, or regularly serving at least twenty-five year-round residents. WAC 246-294-010 (definition of "Group A water systems").

246-294-040. DOH may revoke an operating permit or deny an operating permit application if it determines that the system operation constitutes or may constitute a public health hazard to consumers. WAC 246-294-050. In the event DOH finds that an owner is out of compliance with these rules or any applicable drinking water regulations, it may initiate appropriate enforcement actions. WAC 246-294-090.

DOH also requires that new and expanding public water systems having more than one thousand services comply with standards and regulations relating to fire flow. WAC 246-293-601 and WAC 246-293-602. Water system plans prepared by public water systems having more than one thousand services are required to include a section in their plans addressing fire flow, including hydrant and system reliability standards. WAC 246-293-630. Local jurisdictions are required to set minimum standards for fire flow and, where local standards are not adopted, WAC 246-293-640 sets forth the minimum fire flows for four development classifications, as follows: (1) rural, (2) residential, (3) commercial and multifamily structures, and (4) industrial. "In those areas where minimum fire flow requirements must be met, fire hydrants shall be provided." WAC 246-293-650(1). WAC 246-293-650 sets forth several requirements for the location, installation, and maintenance of fire hydrants.

In the event that water system plans and specifications for water

system improvements are submitted to DOH for approval and the design of the proposed improvements is inconsistent with development classifications identified in the water system plan, DOH shall not approve the plans and specifications. WAC 246-293-620(2). As a result, approval of a water system plan is conditioned on compliance with fire flow and consequently fire hydrant requirements. WAC 246-293-630(1); WAC 246-293-650(1).

The Washington State Legislature has clearly granted authority to DOH to establish regulations and guidelines that must be followed by public utilities operating public water systems in this state. DOH has mandated public utilities with one thousand or more services to provide fire hydrants to the area it serves. Here, as a public water system with one thousand or more connections, SPU is required to submit a water system plan for approval at least once every six years. As part of that plan, SPU is required to include a section in its water system plan addressing fire flow. In areas where fire flow must be met, SPU is required to provide the necessary infrastructure for providing water for fire suppression, including fire hydrants and mains. WAC 246-293-650(1).

Minimum standards for fire flow are required in all development classifications except areas classified as rural. The City of Burien is comprised of residential, commercial/multifamily and industrial areas. CP

801 – 802 at ¶ 3. As a result, SPU must provide adequate infrastructure, including water mains and fire hydrants to those areas in order to gain approval of its water system plan. For over a century, SPU has, in fact, correctly treated fire hydrants as part of its water system infrastructure. Failure to comply with these requirements would jeopardize the viability of SPU's water system plan. Based on the legislative authority granted to DOH, as well as DOH's adopted rules and regulations, it is clear that providing fire hydrants is not within the discretion of SPU, but rather is a legal mandate that, if not followed, would jeopardize SPU's ability to maintain a water system operating permit.[7]

3. The Burien Municipal Code is Consistent with State Law and Requires Builders to Dedicate Hydrants and Other Water System Components to the Water Purveyor.

Consistent with WAC 246-293-650(1) and RCW 80.28.010 requiring water purveyors to provide fire hydrants, Burien adopted BMC 15.20.110(1) requiring applicants for building permits and plat approval to dedicate fire hydrants and other system components necessitated by development, to the water purveyor. BMC 15.20.110(1) provides that

[7] Seattle concedes that state requirements are driving their hydrant costs. "State requirements for hydrant service have become progressively more robust over the last century." CP 883 – 884 at ¶ 7, 932, 945. Although the Seattle representative could not identify what city ordinances required SPU to install hydrants as part of its system, he did acknowledge that the hydrants would have to be provided under the Washington Administrative Code independent of any city regulation. CP 883 – 884, 902, 926 – 927.

"fire hydrants and their supplying mains shall be installed to the standard of the water purveyor and shall be dedicated along with repair easements, where needed, to the purveyor." BMC 15.20.110(1).

In Burien, applicants for building permits and plat approval are required to obtain a Certificate of Water Availability from the water purveyor to ensure that there is sufficient water to serve the proposed development. CP 801, 803 at ¶ 10, 820. When an applicant is required to extend or make water system improvements, the applicant and purveyor enter into a developer extension agreement. *Id.* The purveyor requires the applicant to dedicate the extension or improvement, including fire hydrants, to the purveyor as a condition of the developer extension agreement. *Id.*

In adopting BMC 15.20.110(1), Burien has simply restated the authority of the water purveyor to require dedication of fire hydrants as it is a component of the water system infrastructure. *Id.* This has been the practice in Burien even prior to adoption of this municipal code section. *Id.* Thus, the fire hydrants located in the Burien area served by SPU are owned by SPU.

4. Because fire hydrants are part of the physical infrastructure of SPU's water system, its ratepayers should bear the cost.

   a. SPU has the authority to charge ratepayers for the costs of operating its water system.

The power to operate a water system includes the power to pay for such a system. *Municipality of Metropolitan Seattle v. City of Seattle*, 57 Wn.2d 446, 459-60, 357 P.2d 863 (1960). In *Municipality of Metropolitan Seattle*, appellants contended that the City of Seattle was without power to pledge city revenues to Metro in payment of the sewage disposal service furnished by it because there is no express or implied power or authority in the city's charter, or by statute, granting the city the right to pledge the gross revenue of its sewage utility to pay for the disposal service. Relying on the express legislative authority set out in RCW 35.21.210, the Supreme Court found that cities and towns had the requisite authority:

> The statute (RCW 35.21.210) grants to cities and towns the power to provide for a system of sewers within and without their corporate limits, and to control, regulate, and manage the same. **It must follow that with the power to provide a [water supply] system there is an implied power to pay for it, unless otherwise prohibited by the charter or statute.**

Municipality of Metropolitan Seattle, 57 Wn.2d at 459-60 (emphasis added; substituting the words "sewer utility" with "water supply").

Moreover, the setting of rates and charges, including rate allocation and design is a legislative rather than an administrative function of the *City*. *Jorgensen Co. v. Seattle*, 99 Wn.2d 861, 866 – 867 (1983) (*cert. denied*); see *also People's Org. for Wash. Energy Resources (POWER) v. Utilities & Transp. Comm'n,* 104 Wn.2d 798, 807 – 808, 711 P.2d 319 (1985). In exercising its rate-making authority, the legislature has broad discretion. *Id.* Utility rates imposed by a municipality are presumed reasonable. *Smith v. Spokane County*, 89 Wn. App. 340, 356, 948 P.2d 1301 (1997) (citing *Faxe v. City of Grandview*, 48 Wn.2d 342, 352, 294 P.2d 402 (1956)). The challenger has the burden to establish that rates are unreasonable and arbitrary. *Id.* And the courts have consistently applied the definition of "arbitrary" set out in *Miller v. Tacoma,* 61 Wn.2d 374, 390, 378 P.2d 464 (1963). *Teter v. Clark County*, 104 Wn.2d 227, 237, 704 P.2d 1171 (1985); *State ex. Rel. Dawes v. Washington State Highway Comm'n*, 63 Wn.2d 34, 40, 385 P.2d 376 (1963). This standard requires that the plaintiffs satisfy a heavy burden of proof that SPU's rate-making actions were willful and unreasoning, without regard for the facts and circumstances. *Spokane County*, 89 Wn. App. at 356. Thus, a legislative determination will be sustained if the court can reasonably conceive of any state of facts to justify that determination. *Teter*, 104 Wn.2d at 234 (citing *Ace Fireworks Co. v. Tacoma*, 76 Wn.2d 207, 210,

455 P.2d 935 (1969)). There is no evidence to demonstrate that SPU's rate-making decision was willful, unreasonable and without regard for the facts and circumstances and therefore must be upheld.

b. RCW 35.92.010 requires public water utilities to include expenses for water system infrastructure, including water mains, reservoirs and fire hydrants in its rate.

In 2002, the Washington State Legislature amended RCW 35.92.050 to clarify an ambiguity in the statute. The legislature stated that the "purpose of this act is to affirm the authority of cities and towns to operate fire hydrants . . . as part of their rate-based water utilit[y]." (emphasis added). The legislature finds that it has been the practice of most, if not all, cities and towns, as well as water and sewer districts, to include the operation of fire hydrants for fire and maintenance purposes and to incorporate the cost of this operation as a normal part of the utility's services and general rate structure." RCW 35.92.010. RCW 35.92.010 provides, in relevant part, as follows:

> A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate waterworks, **including fire hydrants** as an integral utility service **incorporated within general rates**, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use,

distribution, and price thereof.

RCW 35.92.010 (emphasis added). Further, RCW 35.92.010 provides that "no rate shall be charged that is less than the cost of the water and service to the class of customers served." Since Burien does not own a water utility, this legislative mandate is not directed at them. Rather it is directed at those municipalities who do operate a water utility such as Seattle.

The Court's primary duty in interpreting any statute is to discern and implement the intent of the legislature. *National Elec. Contractors Association v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). The Court's starting point must always be "the statute's plain language and ordinary meaning." *Id.* When the plain language is unambiguous – that is, when the statutory language admits of only one meaning – the legislative intent is apparent, and the court will not construe the statute otherwise. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d. 320 (1994). Just as we "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language," *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003), we may not delete language from an unambiguous statute: "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. Department of Licensing*, 137

Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

Here, the statute at issue is clear and unambiguous. Based on the express language of RCW 35.92.010, public water utilities are required to include the cost of water and service to fire hydrants in their rates. "No rate shall be charged that is less than the cost of the water and service." As a result, SPU's prior practice of including the cost of fire hydrant in its rates is consistent with state law. There can be no doubt that fire hydrants are part of SPU's physical infrastructure, such as pipes and pumps, and are properly included in SPU's water rates.

c. *Okeson* is inapposite.

The Class claimed, at the trial court level, that Washington Supreme Court's reasoning in *Okeson* as to streetlights is equally applicable to the infrastructure necessary to provide adequate water for fire suppression including fire hydrants.[8] CP 3, 6 – 7 ¶ 13. However, *Okeson* is inapposite.

In *Okeson*, the state Supreme Court found illegal a City ordinance that shifted streetlight costs (operations and maintenance) to electrical

[8] However, SPU is clearly confused as to who is the proper entity to cover fire hydrant expenses if not SPU. This is demonstrated by SPU sending payment demands for hydrant expenses to King County and the respective cities only after identical letters were sent to the fire districts and were met with resistance. CP 3433, 3434 at ¶ 8, 3441 – 3442, 3435 at ¶ 9, 3443 – 3444, 3450, 3452 at ¶ 9, 3467 – 3468.

ratepayers. *Okeson*, 150 Wn.2d at 548. To reach its decision, the *Okeson* court analyzed whether providing streetlights was a governmental or a proprietary function of government. *Id.*, at 549. The principal test was stated in *Okeson* as follows:

> The principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity. *Lakoduk v. Cruger*, 47 Wn.2d 286, 288-89, 287 P.2d 338 (1955) (citing *Hagerman v. City of Seattle*, 189 Wn. 694, 701, 66 P.2d 1152 (1937)). A city's electric utility serves a proprietary function of the government. *Taxpayers of Tacoma*, 108 Wn.2d at 694, 743 P.2d 793 ("Actions taken pursuant to RCW 35.92.050 serve a business, proprietary function, rather than a governmental function."). The electric utility operates for the benefit of its customers, not the general public. For example, this court long ago determined that water rates are not taxes because the "consumer pays for a commodity which is furnished for his comfort and use." *Twitchell v. City of Spokane*, 55 Wn. 86, 89, 104 P. 150 (1909). . . .

Id., at 550.

Applying this test, the *Okeson* court found that streetlight maintenance is a governmental function because "they operate for the benefit of the general public, and not for the 'comfort and use' of individual customers" and "City Light customers have no control over the provision or use of streetlights." *Id.* Thus, the *Okeson* court found although the electric utility itself is a proprietary function of government,

the maintaining and operating of streetlights is a governmental function. *Id.* at 550 – 551.

Applying the reasoning of *Okeson* here yields a different result for several reasons. First, water system purveyors have no option. Under state law and regulations, they must provide sufficient water and fire hydrants to prevent fires. As discussed *infra*, SPU risks loss of its water system permit if it fails to maintain required fire hydrants. Providing the reservoirs, fire hydrants and sufficient water capacity are inextricable components of Seattle's proprietary function, like the pipes and pumps that provide water flow to homes and businesses.

Conversely, the provision of streetlights is entirely discretionary. As the Court noted in *Okeson*, "[s]treetlights are still provided for the welfare of the general public, at the discretion of the city and not individual ratepayers." *Okeson*, 150 Wn.2d at 557 (emphasis added). The City of Seattle is without discretion to provide fire hydrants in its proprietary capacity as a water system purveyor. This lack of discretion necessarily requires a different result than that reached in *Okeson*.

Secondly, the principal test in *Okeson* is one of nexus. The court found insufficient nexus between streetlights and SPU ratepayers. Indeed, streetlights primarily benefit the public at large -- pedestrians, drivers, passengers, bicyclists -- and only tangentially benefit ratepayers

(homeowners and businesses). However, operating and maintaining a large capacity water system is different. It provides water for homes, businesses, and for protection of those structures from fire. Ratepayers are the primary beneficiaries of the increased water capacity. Their homes, businesses, belongings, and lives are protected. The public at large -- pedestrians, drivers, passengers, bicyclists -- only benefits tangentially from these services.

Further, the physical placement of fire hydrants is directly connected to ratepayers' structures – to the development of their properties – receiving SPU's water services. In addition, ratepayers benefit because Washington insurers consider hydrant proximity as a positive factor impacting premium rates.[9] Fire hydrants and the necessary water capacity are available to benefit nearby ratepayers on a standby, as needed, basis in the event of a fire on their property. This SPU infrastructure is like a

[9] Pursuant to RCW 48.19.050, an insurer may authorize a licensed rating organization, such as the Washington Surveying and Rating Bureau ("Bureau"), to file rates with the insurance commissioner on its behalf. The Bureau first sets a grade for each fire district, based on factors such as fire department training and overall water characteristics of the community. This grade is then modified for particular buildings by considering other factors like the proximity to fire hydrants and distance from the fire station. *See* WAC 284-24-100(5)(d) (providing that the quality of fire protection is one of several factors that may be considered in support of a schedule rating plan for insurance purposes); *see also* http://www.wsrb.com/departments/pdf/public protection/wsafc.pdf for more information about how proximity to a fire hydrant impacts a community's grade for insurance rating purposes.

faucet, providing fast, convenient access to the public water supply.

Third, operating and maintaining fire hydrants and the related water system infrastructure are proprietary functions because SPU sells water from its hydrants for multiple purposes. For example, SPU sells water from its hydrants for street cleaning operations, and for building construction sites. CP 883, 884 at ¶ 6, 928 – 931. In addition, hydrants are integral to the maintenance of SPU's water system. Hydrants provide water quality and maintenance needs of the water utility's potable water delivery. CP 833, 834—835 at ¶ 6. They allow dewatering of water lines when major maintenance is necessary. *Id.* They allow access for connecting bypasses when lines are replaced or are out of service for repair. *Id.* Hydrants are placed to provide periodic unidirectional flushing needed to improve taste and remove odors from biofilms that build up in water lines. *Id.* Removal of these biofilms also reduces system corrosion. *Id.* Routine flushing of the system is also needed to remove sediment and impurities as recommended in best management practices of the American Water Works Association. *Id.* This is accomplished with the use of a hydrant. Moreover, opening hydrants is used to achieve a needed velocity particularly important for the removal of sediments and to maintain deliverable flows and pressures to customers. CP 835 – 836 at ¶ 8, 883, 884 at ¶ 5, 923 – 924. Thus, hydrants serve a vital function to the

maintenance and efficiency of SPU's water system.

Thus, for all of these reasons, *Okeson* is inapposite. Under Seattle's prior rate system, ratepayers paid for the costs for operating and maintaining the necessary water capacity to serve and protect their homes and businesses from fire. All ratepayers benefit from this infrastructure. Therefore, SPU lawfully embedded these costs in their rate base. If the City does not want to pass these costs onto ratepayers, SPU, as the water purveyor legally responsible for water system infrastructure (and to whom fire hydrants located in Burien have been dedicated[10]) must bear the cost. For these reasons, it was entirely appropriate for SPU to charge its ratepayers for these costs of operating a water system.

C. The incorporation of the costs associated with operating and maintaining fire hydrants into the general rate structure is not an unlawful tax on rate payers.

The City of Burien joins in the brief filed by the City of Lake Forest Park and in the interest of judicial economy incorporates by reference the arguments made by Lake Forest Park with regard to the tax/fee analysis, as if fully set forth herein.

[10] BMC 15.20.110. "Fire hydrants and their supplying mains shall be installed to the standard of the water purveyor and shall be dedicated along with repair easements, where needed, to the purveyor." Thus, this entire matter can be resolved on the basis that providing hydrants is a proprietary function. The question of whether hydrant costs are a tax versus a regulatory fee need not be reached. Hydrant expenses are neither a tax nor a fee but rather a necessary cost of doing business as a water utility.

D. Seattle has no authority to recover the costs of maintaining fire hydrants located within the City of Burien.

1. Burien has not agreed to pay for hydrants by contract.

Seattle has not alleged, nor can it prove, a contract with Burien related to its water system, fire hydrants or fire protection that requires payment to Seattle. While SPU may enter into contracts (*see* RCW 35.91.020), mutual assent is a required element.

> Mutual assent is required for the formation of a valid contract. 'It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time. Mutual assent generally takes the form of an offer and an acceptance.'

Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388, 858 P.2d 245 (1993).

Here, Burien has not assented to pay the costs of fire hydrant services. CP 3450, 3453 at ¶ 11. Burien does not have any contract with SPU obligating it to pay. *Id.*

2. Seattle can not meet the *Covell* test with respect to Burien and Lake Forest Park.

SPU appears to be proceeding on the theory that if provision of fire hydrants and fire protection is a governmental function, then the local governments in the area served should bear the cost of that service in their

jurisdiction, regardless of whether they are in the water supply business or whether they use the hydrants. The City of Burien is aware of no legal authority – statutory or common law – supportive of that position. In fact, SPU is asking the court to do what it cannot; that is, tax another municipality.

In determining whether a charge imposed by a local government is a valid regulatory fee or an unconstitutional tax, courts apply the three-part test set forth in *Covell v. City of Seattle,* 127 Wn.2d 874, 905 P.2d 324 (1995). The first inquiry is whether the primary purpose of the legislation in question is to "regulate" the fee payers or to collect revenue to finance broad-based public improvements that cost money; second, the courts determine whether the money collected from the fees is segregated and allocated exclusively to regulating the entity or activity being assessed; and third, the courts ascertain whether a direct relationship exists between the rate charged and either a service received by the fee payers or a burden to which they contribute. In this case, Seattle cannot meet this test as to these third party defendants. There is no evidence that that this charge regulates the conduct of these defendants. There is no evidence that the charge is segregated for the purpose of regulating these defendants. And there is no evidence of a direct relationship between the charge and these defendants. As a result, passing the cost of hydrants to these third party

defendants is an unlawful tax.

As with its ratepayers, the law governing a municipality's taxing authority requires a similar result with respect to Seattle's efforts to recover a portion of its fire hydrant maintenance costs from other municipalities. Article VII, § 9[11] and Article XI, § 12[12] of the Washington State Constitution permit the legislature to grant municipal authorities the power to levy and collect taxes for local purposes. Const Art. XI, § 12; *King County v. City of Algona*, 101 Wn.2d 789, 791, 681 P.2d 1281 (1984). However, these constitutional provisions are not self-executing. *Algona*, 101 Wn.2d at 791; *Carkonen v. Williams*, 76 Wn.2d 617, 627, 458 P.2d 280 (1969). Accordingly, **municipalities must have express authority, either constitutional or legislative, to levy taxes**. *Algona*, 101 Wn.2d at 791; *Citizens for Financially Responsible Gov't v. City of*

[11] Const. art. 7, § 9 provides:
"The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

[12] Const. art. 11, § 12 provides: "The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes."

Spokane, 99 Wn.2d 339, 342, 662 P.2d 845 (1983) (emphasis added).[13]

Allowing SPU to enforce the recovery of the cost of fire hydrant maintenance against Burien would amount to an imposition of an extra-territorial tax. Seattle has no authority to impose extra-territorial taxes. Neither the constitution nor the legislature has expressly authorized Seattle to tax the third party defendants for anything, let alone the costs of maintaining SPU fire hydrants. Moreover, the Seattle City Council has not adopted an ordinance purporting to tax Burien or Lake Forest Park. Instead, SPU billed the third party defendants as a new "public fire customer class" for its hydrant rate. CP 3137, 3138 at ¶ 5, 3176 – 3177. Should the court find that the charge is a tax as to water customers then this charge is no more legal when applied to the cities of Burien and Lake Forest Park. There is no direct relationship between this benefit and the cost assessed against the municipal rate-payers, since these ratepayers provide no governmental fire suppression services and therefore receive no benefit for the rate assessment. Further, because these third party defendants do not have fire departments, no burden is produced to justify a rate assessment. In effect, Seattle is asking the court to impose a tax on

[13] The police powers granted to local governments by article XI, section 11 of the Washington State Constitution do not include the power to tax. Const. art. XI, § 11; *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995); *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 634, 854 P.2d 23 (1993); *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982) (*Hillis Homes* I).

the third party defendants, a power the court does not have.

E. Should The Court Determine That The Costs Of SPU Infrastructure Should Be Borne By A Governmental User, Those Users Are The Fire Districts That Serve The City Of Burien.

The City of Burien does not provide any fire suppression services to their respective jurisdictions. Rather, Fire Districts provide all fire suppression services to these areas pursuant to state law. Thus, assuming that SPU has a legal basis for charging and billing the entity that utilizes the fire hydrants, that entity is not the City of Burien.

One possible avenue for collection may be the fire protection districts that serve the cities. Fire protection districts are political subdivisions of the state and are municipal corporations, just like cities. RCW 52.12.011. The purpose of a fire district is to provide fire protection services, fire suppression and emergency medical services. RCW 52.02.020. To accomplish this purpose, fire districts are authorized to lease, own, maintain, operate and provide all other necessary or proper facilities, machinery, and equipment for the prevention and suppression of fires and the protection of life and property. This includes the exercise of its governmental power to contract with any governmental entity for fire prevention and suppression. RCW 52.12.031 (1), (3).

By way of background, a fire district's fire protection services are automatically provided to a city upon a city's incorporation into the

district, unless the city council adopts a resolution blocking the annexation. RCW 52.04.161. For the district to continue providing the fire protection services, the city voters must approve permanent annexation. *Id.* In the event a city chooses not to annex into a fire district, cities are authorized to provide fire protection services via their own city fire department. RCW 35.21.030.

The City of Burien does not operate a fire department, but rather has an interlocal agreement with King County Fire Protection District No. 2 ("Fire District No. 2") who in turn contracts with North Highline Fire District No. 11 ("Fire District No. 11") to provide fire protection and suppression services within Burien's boundaries. CP 3137, 3138 at ¶ 10, 3282 – 3296. Thus, in Burien, the function of firefighting is solely that of Fire District Nos. 2 and 11. *Id.,* CP 3283 at 2.5.

Based on the foregoing and assuming *arguendo* that the fact of using the hydrant converts SPU's water system components into governmental functions, the Fire Districts are the governmental entities utilizing the hydrants, not the City of Burien. SPU reached the same conclusion when it demanded payment from the Fire Districts in the first instance. CP 3498, 3499 at ¶ 2, 3505 – 3506. When the Fire Districts declined to pay, SPU shifted its collection focus and sent the identical demand letter to the cities and King County. *See, e.g.,* CP 3450, 3452 at ¶ 9, 3467 – 3468. Thus, it is

apparent that SPU does not have a clear understanding of the appropriate party to bear these costs.

As the entities that consume SPU's fire hydrant waters and that are responsible for operating and maintaining the fire hydrants, the respective Fire Districts may bear the associated costs. At the outset, SPU reached the same conclusion, as reflected in the testimony of Chris Potter, SPU's former Rates and Financial Planning Manager:

> A. At the time we put together the rate study for 2005 and 2006, we believed that like in Seattle, the cost of providing the fire plug and water at the fire plug was a cost associated with the **firefighting service.** So we identified the **firefighting service providers** in our retail service are outside the city limits and sent them a bill.
>
> ...**somebody has to get water from a fire hydrant to a fire.** You can think of that as a component to a **firefighting service.** So nobody has a private firefighting capacity. **For us that meant that the fire plugs were there for the purpose of supplying water to the entity that provides that intermediate service to the fire department.**
>
> Q. Regardless of whether they were on private or public property?
>
> A. That's correct.[14]

SPU later changed its customer list for hydrants, by eliminating fire

[14] CP 3498, 3499 at ¶ 2, 3504 – 3506; Compare table "SPU Hydrant Customers," 3518 at ¶¶ 3 – 4, 3518 – 3519, 3520 – 3521. (emphasis added).

districts, and substituting suburban municipalities and King County. However, SPU's accompanying text justifying the charges remained the same (bill format shows changes to the earlier text):

> Water furnished at or near the location of a fire is a **cost of fire fighting,** just as firefighter salaries and fire trucks are. The annual bill for a hydrant will be sent to the city ((~~or fire district~~)) **responsible for providing firefighting services at the location of that hydrant**...[15]

Since the Fire Districts are "responsible for providing firefighting services at the location of [the] hydrant", the Fire Districts could be considered SPU fire hydrant customers, not Burien.

To provide firefighting services, including the lease, ownership, maintenance, and operation of all necessary or proper facilities, fire districts are authorized to levy and collect assessments and special taxes to fund fire suppression services. RCW 52.12.021. The fire districts may also assess special benefit charges "reasonably proportionate to the measurable benefits to property resulting from the services afforded by the district." RCW 52.18.010. Thus, unlike Burien they have the necessary authority to collect for this type of facility[16].

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[15] CP 3518 – 3521. (emphasis added).

[16] In addition, the Local Government Accounting Act, RCW 43.09.210 requires the benefited governmental entity to pay fire hydrant expenses.

VI. CONCLUSION

The hydrants, mains and reservoirs at issue in this case are part of SPU's water system infrastructure as such are appropriately included in the rates charged to SPU customers, as this is part of the proprietary function of the utility. Moreover, hydrants are mandated by state law and are essential to the continued permitting of the water utility and are thus a necessary operating expense of the utility, which is appropriately included in the general rate.

Finally, should the court conclude that the provision of hydrants is a governmental function which should be considered part of fire suppression services, the City of Burien is not the appropriate party to pay for such charges. The City of Burien does not engage in fire suppression activities, as those services are provided by the North Highline Fire District. Thus, if the one who uses the hydrant is the one that must pay, Burien is not the proper party. Based upon the forgoing, Burien respectfully requests that its appeal be granted and that the case against it be dismissed.

DATED this 17 day of September, 2007.

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